Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1995

JAN PARTIN,

Petitioner,

v.

STATE OF FLORIDA,
COMMISSION ON ETHICS,

Respondent.

Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida For The Second District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE FINAL ORDER OF THE FLORIDA COMMISSION ON ETHICS' CONCLUSION THAT PETITIONER "ACTED CORRUPTLY" UNDER THE STATE CODE OF ETHICS AND ASSESSMENT OF MONETARY PENALTIES EQUIVALENT TO A SECOND DEGREE FELONY, IN THE ABSENCE OF GUIDELINES OR PROVISIONS FOR JUDICIAL REVIEW OF THE PENALTY, VIOLATES PETITIONER'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

II. WHETHER THE FINAL ORDER OF THE FLORIDA COMMISSION ON ETHICS VIOLATES PETITIONER'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT.

PARTIES TO THE PROCEEDINGS

The following party is the Plaintiff below and is the Respondent before this Court:

State of Florida, Commission on Ethics

The following party was the Defendant below and is the Petitioner before this Court:

Jan Partin

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Jan Partin ("Partin" or "Petitioner"), respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the District Court of Appeal of Florida, Second District, entered in this proceeding on July 26, 1995.

OPINIONS BELOW

The opinion of the Florida District Court of Appeal dated July 26, 1995, affirming, without opinion, the Florida Commission on Ethics ("Commission"). The Order was issued on July 26, 1995,

is unreported. It is reprinted at Appendix A. The opinion which was affirmed by the District Court of Appeal is the Final Order of the Commission, also unreported, and reprinted at Appendix B. The Commission's Order, in turn, includes references to the Findings of Fact and Conclusions of Law embodied in the Recommended Order of the Hearing Officer of the Florida Department of Administrative Hearings issued on December 22, 1993. It is unreported and reprinted at Appendix C.

JURISDICTION

The Order of Affirmance of the Florida District Court of Appeal, Second District, was entered on July 26, 1995.

Jurisdiction of this Court to review this case on Certiorari rests on 28 U.S.C. Section 1257(a). Because the Second District Court of Appeal elected not to write an opinion, the Supreme Court of Florida was without jurisdiction to review this case and the First District Court of Appeal is the highest Florida state court in which a decision could be had. Fla. Const. Art. V Section 3(B)(3); Florida Supreme Court Manual of Internal Operating Procedures II A1.(A); *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980); *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Ibanez v. Florida Board of Accountancy*, 114 S.Ct. 2084 (1994).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution reprinted in Appendix D to this Petition.

STATEMENT OF THE CASE

Jan Partin was the Administrative Assistant to the Executive Director of the Winter Haven Housing Authority in Winter Haven, Florida. The Executive Director of the Housing Authority was the formal administrator of the Section 8 Program, a program funded by the U.S. Department of Housing and Urban Development (HUD) to provide rental assistance to eligible tenants. In her capacity as administrative assistant to the Executive Director, Petitioner exercised responsible administrative, supervisory and technical management functions in assisting the Executive Director. In the absence of the Executive Director, she was totally responsible for the operation of the Housing Authority. (App. 16a)

Oswald and Leah Carrerou, owned rental property in Winter Haven, and in 1989 and 1990 were landlords in the Housing Authority's Section 8 Program. (App. 16a). Carrerou's primary staff contact with the Housing Authority with regard to the Section 8 program was Petitioner. Carrerou's perception was that Partin had some control over Carrerou's continued participation as a Section 8 landlord. This perception was reasonable, even if not technically or legally correct. (App. 17a)

On March 5, 1991, Carrerou filed a complaint with the Commission on Ethics alleging that Partin had "coerced" Carrerou into making a loan to an individual named Timothy Keaton. The complaint alleged that Partin had told Carrerou that the money was to be used to keep Keaton as a credible witness for the Housing Authority in a current federal case by a tenant against the Housing Authority.

The complaint further alleged Carrerou had submitted a

claim to the Housing Authority in the amount of $1,258.00 for damages to one of his apartments caused by a former Section 8 tenant. He alleged that his claim was turned down and settled with a $158.00 payment.

The Rules promulgated under Chapter 112 are found in the Florida Administrative Code, at Fla. Admin. Code R34-5.0001 through 34.5031. The rules require that the Commission on Ethics has the duty to investigate "all facts and parties" materially related to the complaint at issue. R34-5.0042. The chairman of the Commission is empowered to authorize the issuance of subpoenas. R34-5.003.

The Rules provide that an investigator shall collect all evidence materially related to the allegations of the complaint and shall prepare a report for the Commission. R34-5.004(2),(3),(6), (7), and (8).

Nowhere in these rules does it appear that the investigator, advocate or Commission is required to advise the respondent of the respondent's rights under the Fifth and Sixth Amendments.

In the instant case the investigator interviewed the Petitioner and included the substance of the interview in his report. Nowhere in the report does it appear that the investigator advised Petitioner of her rights under the Fifth and Sixth Amendments.

The Advocate for the Commission stated in the Recommendations that although the evidence is "somewhat ambiguous", the Commission should find probable cause to believe a violation of §112.313(6) has occurred.

On July 8, 1993 a formal hearing under §120.57(1), Florida Statutes was held before a Hearing Officer of the Division of

Administrative Hearings. In the Recommended Order entered at the conclusion of the hearing the Hearing Officer stated as follows:

> On December 6, 1991 the Florida Commission on Ethics found probable cause that Jan Partin, while employed as Administrative Assistant to the Winter Haven Housing Authority's Executive Director violated section 112.313(6), F.S. by coercing a Mr. and Mrs. Carrerou into making a loan to a potential witness in a federal court trial involving the Housing Authority and by representing to the Carrerous that the Housing Authority would repay the loan. (App. 15a)

At the hearing, Carrerou testified that he could not recall what went on during the conversation with Petitioner beyond the overall gist of the conversation. Partin told him that the person needed money to pay his lawyer in a child custody dispute.

Petitioner testified that Timothy Keaton, a non-tenant came into her office at the Housing Authority and said he was trying to get custody of his children. He asked if she knew of any attorneys and knew where he could get the money to pay for one. Petitioner testified that she gave Keaton the names of three individuals who might lend him money including Carrerou. The Hearing Officer found that Petitioner was intimately involved with Keaton. (App. 20a) Partin had urged Keaton to hire a lawyer to get custody away from the children's mother because she believed the mother was neglecting the children.

Ultimately, Keaton's mother signed a promissory note for $1200.00 and Carrerou loaned Keaton that amount of money. (App. 18a). Because Carrerou was not repaid, his wife called Petitioner

who assured her she would get the money. Later Carrerou sued Keaton's mother on the note and a final judgment was entered in favor of Carrerou. (App. 19a).

However, Carrerou filed a satisfaction of judgment when he learned that Keaton had torn up the original check issued in order to avoid binding himself or his mother. (App. 19a).

The Hearing Officer found that:

> commonly and within the Housing Authority's function of providing services to tenants or other members of the public, Housing Authority staff make referrals to other social service agencies or resources. The referral of Timothy Keaton to a landlord in a housing authority program was not within the scope of that appropriate function. The greater weight of evidence established that it was Partin's romantic relationship with Keaton, rather than any eleemosynary impulse that motivated her misguided efforts on his behalf." (App. 19a - 20a).

On the basis of these Recommended Findings of Fact the Hearing Officer cited §112.313(6) and 112.312(9), Florida Statutes, which provide as follows:

> (6) MISUSE OF PUBLIC POSITION. -- No public officer or employee of an agency shall corruptly use or attempt to use his official position or any property or resource which may be within his trust, or perform his official duties, to secure a special privilege, benefit, or exemption for himself or others. This section shall be not

construed to conflict with s. 104.31.

"Corruptly" is defined in Section 112.312(9), Fla. Stat.:

> (9) "Corruptly" means done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his public duties. (App. 20a)

The Hearing Officer concluded that Petitioner was at the time of the incident at issue an "employee of an agency" as provided in §112.313(6), Fla. Stat., and 112.313(2), Fla. Stat. (App. 20a-21a).

The Hearing Officer also recommended the following Conclusion of Law Number 19:

> The greater weight of credible evidence established that Jan Partin used her official position in order to obtain a loan from the Carrerous to benefit a man with whom she was intimately involved. That he was also a witness for the housing authority provided the excuse, but not the lawful justification, for her pressure on the Carrerous. Her wrongful intent is determined from the circumstances surrounding her relationship with Keaton and the Carrerou's relationship with the housing authority. The Acting Advocate proved the first violation of section 112.313(6), F.S., by Jan Partin. (App. 21a)

Regarding a penalty, the Hearing Officer noted that the

Advocate for the Commission had "suggested a penalty of restitution and a 'fine' of $5,000."

The Hearing Officer recommended that the Commission on Ethics enter its Final Order finding that Partin violated Section 112.313(6), Fla. Stat., and recommended restitution in the amount of $1,200.00, and civil penalty of $5,000.00. (App. 22a)

Following the Recommended Order Partin's attorney submitted exceptions to the Recommended Order.

B. OPINION OF THE COMMISSION

On March 15, 1994, the Commission on Ethics entered its Final Order and Public Report. (App. 2a) The Commission rejected all Partin's exceptions and concluded that the findings of the Hearing Officer were based upon competent, substantial evidence and that the administrative hearing complied with the essential requirements of the law (App. 11a). With respect to Partin's exception to Recommended Conclusion of Law Number 19, the Commission stated as follows:

> Respondent argues further that the definition of "corruptly" does not disallow helping others. She argues that the Hearing Officer's Conclusion does not find Respondent's acts to have been inconsistent with the proper performance" of her public duties. This exception is also rejected. Contrary to Respondent's assertion is the Hearing Officer's finding in paragraph 15 of her Findings of Fact that the referral of Timothy Keaton for a loan to a landlord in a Housing Authority program was not within the scope of the appropriate function

> of the Housing Authority's staff to refer tenants and other members of the public to other social service agencies or resources. In light of this finding, we conclude that Respondents arranging a loan for Mr. Keaton from Mr. Carrerou was inconsistent with the proper performance of her public duties. Therefore, inasmuch as the Hearing Officer found that Respondent acted with wrongful intent to obtain a benefit (the loan from Mr. Carrerou for Mr. Keaton) and that her actions were inconsistent with the proper performance of her public duties, we conclude that Respondent acted "corruptly" within the meaning of Section 112.312(9), Fla. Stat., and that the Hearing Officer correctly concluded that the Respondent violated Section 112.313(6), Fla. Stat. (App. 10a).

The Commission approved, adopted and incorporated the Proposed Conclusions of Law (except as modified in paragraph 11 above to add the Conclusion that Respondent's actions were inconsistent with the proper performance of her public duties. . ." (App. 11a)

The Commission found that Partin violated Section 112.313(6), Fla. Stat., and recommended that a penalty of restitution of $1,200.00 and a civil penalty of $5,000.00 be imposed upon Partin for a total of $6,200.00 in a Final Order rendered on March 15, 1994. (App. 11a)

C. ORDER OF THE APPELLATE COURT

Petitioner appealed the Commission's order to the District

Court of Appeal, Second District of Florida, which affirmed the Board's decision, without opinion, on July 26, 1995. This Order is reprinted at Appendix A (App. 1a)

HOW THE FEDERAL QUESTION WAS RAISED AND PASSED ON

Prior to the entry of the Final Order by the Commission, Petitioner's counsel filed exceptions to the Recommended Order stating, inter alia, that there was no basis for a finding of corrupt intent, no finding that Petitioner's acts were inconsistent with the "proper performance" of her public duties, that there was no personal gain for Petitioner, that the penalty was out of proportion to any offense proved, and that "restitution" was unconscionable when the debt had been paid by judgment.

Petitioner's appellate briefs to the Florida District Court of Appeal, Second District, extensively discussed the issues raised in this Petition for Writ of Certiorari. Specifically, Petitioner argued that the Final Order violated Petitioner's right to due process because the complaint filed by Carrerou and the probable cause finding alleged that Petitioner had violated Section 112.313(6), Fla. Stat., by "coercing" the Carrerous into making a loan. Petitioner argued that neither the Recommended Order of the Final Order contained any finding that the Petitioner engaged in "coercion". Yet, the Final Order concluded that Petitioner acted "corruptly".

Petitioner argued in her brief that the Commission's Final Order constituted a violation of her right to due process because of inadequate notice as guaranteed by concepts of due process which apply to administrative hearings under *Goldberg v. Kelly*, 397 U.S. 254 (1970).

Specifically, Petitioner argued that the Complaint filed by

Carrerou was that Petitioner had "coerced" Carrerou into making the loan. This was the basis of the probable cause determination of the Commission and was the issue to be decided by the Hearing Officer. However, Petitioner argued, there was no finding by the Hearing Officer or the Commission that Petitioner had "coerced" Carrerou. Petitioner was not charged with "arranging" or "referring" yet that was the finding of the Hearing Officer and the Commission. Petitioner argued that she had no notice that she was defending herself against any charge other than coercion.

Petitioner also devoted eight pages in her Initial Brief to a discussion of the manner in which the assessment of monetary penalties under the statutory scheme including §112.317(1)(d) constituted a criminal punishment without the procedural safeguards of a criminal prosecution. Petitioner cited and applied the following decisions of this Court: *Rex Trailor Co. v. United States*, 350 U.S. 148 (1956), *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), United States v. Ward, 448 U.S. 242 (1980) and *United States v. Halper*, 490 U.S. 435 (1989).

Petitioner argued that she had been stripped of her reputation and punished by the Commission as if she had committed a felony. Petitioner argued that the statute assessing the penalty was unconstitutional under the Fifth, Sixth, Seventh, and Fourteenth Amendments to the United States Constitution.

She argued that the "end result" is that she has been denied due process as well as access to the courts.

Petitioner argued that the "cumulative effect" of the foregoing "was that the Commission had punished her without benefit of charge, right to be free from self-incrimination, right to effective assistance of counsel, jury trial, conviction or right to judicial review of penalty. Petitioner argued that this constituted a

denial of Petitioner's rights under the Fifth, Sixth, Seventh and Fourteenth Amendments to the United States Constitution.

Petitioner also argued in the Initial Brief that the violation of her right to due process was compounded by the ruling of the Florida Supreme Court and lower courts that a reviewing court is without authority to review the penalty imposed by an agency so long as the penalty imposed is within the permissible range of statutory law unless agency findings are in part reversible.

In the Commission's Answer Brief, the Commission argued that Petitioner's rights were not violated in the manner described in the Initial Brief, and that the penalty provision contained in Section 112.317(1) provided for the penalties permitted under the Florida Constitution and that Section 112.317(1) provided for the penalties in the instant case. Thus, the issues were joined by the Commission.

In her Reply Brief, Petitioner devoted three additional pages in support of her argument that the statute permits the Commission to assess a penalty against Petitioner which is tantamount to a criminal penalty and that other statutes in the State of Florida provide guidelines for administrative agencies to utilize in imposing penalties. Petitioner also argued that under other statutes which provided for revocation of professional licenses required the burden of proof of "clear and convincing evidence."

The Second Court of Appeal issued a *per curiam* decision, without opinion.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS WHICH HOLD THAT IF A SANCTION, ALTHOUGH LABELED A "CIVIL PENALTY", IS PUNISHMENT THEN THE PROCEDURAL SAFEGUARDS REQUIRED AS INCIDENTS OF A CRIMINAL PROSECUTION ARE NECESSARY

The decision below constitutes a punishment of the Petitioner by a state agency based on a finding that Petitioner's actions were "corrupt". Based on this conclusion, the Commission assessed a "civil penalty" of $5,000.00 and a so-called "restitution penalty" of $1,200.00 against Petitioner.

The effect of this decision is that a state agency assessed a punishment the equivalent of a second degree felony against petitioner without any means of judicial review of the reasonableness or amount of the penalty.

Analysis of Chapter 112, Florida Statutes

In stating its intent in enacting the "Code of Ethics for Public Officers and Employees" the Florida Legislature stated "that it is the intent of the Legislature that this code shall serve not only as a guide for the official conduct of public servants in this state but also as a basis for discipline of those who violate the provisions of this act." (Reprinted in full in Appendix E)

Section 112.317(1) provides that violation of any provision of this act "in addition to any criminal penalty or other civil penalty involved, shall, pursuant to applicable constitutional and statutory

procedures, constitute grounds for and may be punished by one or more of the following:

> (d) in the case of former public officer or employee who has violated a provision applicable to former officers or employees or whose violation occurred prior to such officers or employees leaving public office or employment:
>
> (1) Public Censure and Reprimand
> (2) A civil penalty not to exceed $5,000.00.
> (3) Restitution of any pecuniary benefits received because of the violation committed.

The predecessor to the statute, Section 112.317, Fla. Stat. (1973) made a violation of Section 112.313 a criminal offense punishable as a first degree misdemeanor. However, the Legislature repealed that part of Section 112.317 leaving the so-called civil penalties intact. *Tenney v. State Commission on Ethics,* 395 So. 2d 1244, 1246 (Fla. 2d DCA 1981).

Section 112.317(2), Fla. Stat. provides as follows:

> In any case in which the Commission finds a violation of this part or of Section 8, Article II of the State Constitution and recommends a civil penalty or restitution penalty, the Attorney General shall bring a civil action to recover such penalty. No defense may be raised in the civil action to enforce the civil penalty or order of restitution that could of been raised by judicial review of the administrative findings and recommendations of the Commission by certiorari to the District Court of Appeal.

Section 112.3241, Fla. Stat., provides as follows:

> Any final action by the Commission taken pursuant to this

> part shall be subject to review in a District Court of Appeal upon the petition upon the party against whom an adverse opinion, finding, or recommendation is made.

In *City of Miami Beach v. Galbut*, 636 So. 2d 192 (Fla. 1993), the Supreme Court of Florida held that Section 112.313(6) is a penal statute because it imposes a penalty. Indeed, the Supreme Court stated that the "penalties at stake" include loss of livelihood, professional reputation which, "though non-criminal, are nonetheless significant and substantial." *D'Alemberte v. Anderson*, 349 So. 2d 164, 168 (Fla. 1977). The lower courts in Florida have referred to the act as "imposing severe penalties." *Barker v. State of Florida, Commission on Ethics*, 654 So. 2d 646, 649 (Fla. 3d DCA 1995).

Indeed, in the Recommended Order the Hearing Officer stated as follows:

> The Acting Advocate has suggested a penalty of restitution and a fine of $5,000.00 for each violation. Section 112.317, Fla. Stat. establishes the type of penalties which may be imposed for violations for the Code of Ethics. . ."

In *Debusk v. Smith*, 390 So. 2d 327, 328 (Fla. 1980), the Supreme Court of Florida stated that Chapter 112 gives each party the due process to which he is entitled and that Section 112.3241 "gives one right of review where all judicially reviewable issues should be raised."

Section 120.68, Fla. Stat., provides for judicial review of agency action such as the Final Order of the Ethics Commission. The Section 120.68(8), (9), and (10) provide that the reviewing court empowered to set aside, modify, or remand the agency action were the agency has "erroneously interpreted a provision of law and

that a correct interpretation compels a particular action," Section 120.68(9) or if it finds the agency's exercise of discretion was a violation of a constitutional or statutory provision. (Section 120.68(12)) The judicial review in the District Court of Appeal is not *de novo* but instead is based on the record developed in the hearing before the Hearing Officer. Section 120.68(5). The findings contained in a recommended order may not by rejected or modified unless they are unsupported by the evidence. *Kimball v. Hawkins*, 364 So. 2d 463, 465 (Fla. 1978).

The Supreme Court of Florida has ruled that the District Courts of Appeal are without authority to review the penalty imposed by an agency so long as the penalty imposed is within the permissive range of statutory law unless the agency findings are in part reversed. *Florida Real Estate Commission v. Webb*, 367 So. 201 (Fla. 1978); *Fresh Start, Inc. v. Division of Alcoholic Beverages and Tobacco*, 469 So. 2d 244 (Fla. 2d DCA 1985). Therefore, Section 112.313(6) is the offense which the Commission found that the Petitioner violated. Accordingly, it was the predicate offense for the imposition of the monetary penalty provided by Section 112.317(1).

Regarding the so-called "civil penalty" it must be emphasized that under Section 215.32(2)(a), Fla. Stat., all monies received by the state from every source whatsoever are to be deposited within the general revenue fund unless specifically provided otherwise. Therefore, the so-called "restitution penalty" which would be collected by the Attorney General pursuant to Section 112.317 would be paid to the State General Revenue Fund rather than to the victim, Carrerou. The Commission stated in its briefs before the District Court of Appeal that therefore restitution under this statutory scheme is a "penalty rather than a remedy."

Analysis of the Court's Decisions on Punishment

In *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 167 (1963) this Court considered the constitutionality of federal statutes under which a person could be administratively divested of his United States citizenship for having left the country to evade military service. The Court stated, "If the sanction these sections impose is punishment the procedural safeguards required as incidents of a criminal prosecution are lacking. We need go no further." This Court held the statutes in question were unconstitutional on the ground that "in them, Congress has plainly employed the sanction of deprivation of nationality as a punishment without affording the procedural safeguards guarantee by the Fifth and Sixth Amendments." 372 U.S. at 167. In disposing of this question this Court employed an analysis consisting of seven factors. 372 U.S. at 168. Those factors and their application to the instant case are as follows:

(1) Whether the sanction involves an affirmative disability or restraint.

It must be emphasized that a finding that a public official or employee has violated the Code of Ethics itself is a penalty. The Florida Supreme Court has noted that such a penalty includes loss of livelihood and professional reputation which penalties the Florida Supreme Court described as "significant and substantial." *D'Alemberte v. Anderson*, 349 So. 2d 164, 168 (Fla. 1977). See also, *Zerweck v. State*, 409 So. 2d 57, 60 (Fla. 4th DCA 1982)(branding a public official as a law-violater (sic) is a penalty in itself.")

There can be no doubt that a monetary penalty of $6,200.00 involves an affirmative disability or restraint. Further, the $5,000 00 penalty alone is the equivalent of the amount of a fine

which may be imposed for a felony of the third degree. Section 775.083(1)(c), Fla. Stat. Adding the so-called "restitution penalty" which is simply an additional penalty to be paid to the state, the total of a $6,200.00 penalty is the equivalent of a fine which may be imposed for a felony of the second degree in the State of Florida. Section 775.083(1)(b), Fla. Stat.

(2) Whether the sanction has historically been considered a punishment

There can be no doubt that a $6,200.00 monetary penalty has been regarded as a punishment since it is codified in Florida law as the amount of a fine which may be imposed for a felony of the second degree.

(3) Whether the sanction comes into play only on a finding of scienter

Section 112.316(6) prohibits a public officer from corruptly using his official position. Section 112.312(9), defines "corruptly" as being done with a "wrongful intent." Because the statute requires "wrongful intent", which is a state of mind, in order to constitute a violation of the statute, there can be no doubt that scienter is required as an element of this offense. It is important to note that unlike other statutes in which a monetary penalty is imposed for violation of a statute, such statutes provide for the penalty as a matter of "strict liability." The mandatory penalty is imposed for a violation. See, 29 U.S.C.A. Section 666(a)-(c). For example, a violation of the Occupational Safety and Health Act results in a civil monetary penalty without any requirement of a finding of "wrongful intent" or state of mind.

(4) Whether the statute promotes the traditional aims of punishment, retribution and deterrence.

As has been stated, the legislative intent of the statute clearly indicates that the intent of the legislature was not only to provide an official guide for public servants but also a basis of "discipline" of those who violate the provisions of the act. Section 112.311(5), Fla. Stat. Additionally, the penalties under the act apply not only to current public officers but former public officers or employees. Section 112.317(1)(d), Fla. Stat. In the instant case, the Hearing Officer found that although there had been no evidence as to whether Petitioner was still employed with the Housing Authority that the penalties were appropriate for both existing and former employees.

In *United States v. Halper*, 490 U.S. 35, 448 (1989), this Court held that a "civil as well as criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment." This Court stated that a civil sanction that "cannot be fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes is punishment, as we have come to understand the term." 490 U.S. at 448.

This Court further stated that the labels affixed to the proceeding or the relief imposed are "not controlling" and will "not divert the applicable protections of federal constitutional law." 490 U.S. at 448.

The Code of Ethics for Public Officers and Employees clearly serves objectives of retribution and deterrence which are not legitimate, non-punitive governmental objectives. Indeed, the preamble of the statute states that one of the purposes of the statute is to serve as a basis for "discipline" of those who violate the provisions of this part. In the instant case, the Hearing Officer clearly stated that the "issue for disposition in this proceeding is whether that violation occurred, and if so what penalty is

appropriate." (App. 15a)

In *Helvering v. Mitchell*, 303 U.S. 391 (1938) this Court held that the chief purpose of the statute was to provide for restitution to the government of money taken from it by fraud, and the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole. This Court held that since proceedings under the statute were remedial and designed to protect the government from financial loss" - "rather than to vindicate public justice" - they were civil in nature. 303 U.S. at 548, 549.

In the instant case, there was no indication in the statute or in the record that any money was taken from the government or that the penalties imposed would in any way insure the State of Florida would be made completely whole upon the payment of the penalties.

The conclusion that the statute is retributive, punitive in purpose is reinforced by the fact that the penalties of the statute are assessed against the public official or employee even if they are no longer public employees. In the instant case, there was no evidence that the petitioner was still a public employee at the time of the hearing.

Further, in Section 112.317(1)(d)(2), Fla. Stat., merely indicates that the civil penalty may not exceed $5,000.00. This means that the Commission is free to impose whatever civil penalty it desires. The statute does not contain any guidelines for consideration in determining the amount of the civil penalty, therefore, the amount of the penalty is totally arbitrary. In the instant case, the Advocate for the Commission on Ethics suggested the penalty of restitution in the amount of $1,200.00 and a "fine" of $5,000.00. The Hearing Officer determined that the suggested

penalties were appropriate and incorporated them in her recommendation.

Although not specifically stated, the $1,200.00 "restitution penalty" was apparently based on the amount of the loan which Carrerou made to Keaton despite the fact that Carrerou had already filed a satisfaction of judgment for that amount and the $1,200.00 is required to be paid to the State Treasury and not to Carrerou.

(5) Whether the behavior to which it applies is already a crime:

As has been stated, although the predecessor statute provided for a criminal penalty in the form of a first degree misdemeanor for the violation of the statute, the Florida legislature repealed the criminal penalty and there is no statute under which petitioner could be prosecuted criminally.

This forces the conclusion that the penalty in this case is punitive. However, removing the criminal penalty from the statute and changing the label to "civil penalty" does not negate the punitive nature of the sanction. The only difference is that under the statute in effect it is easier to find a public officer or employee "corrupt" without the incidents of a criminal prosecution.

(6) Whether an alternative purpose to which it may rationally be connected is assignable for it.

In the instant case there is no alternative purpose to assign to the imposition of the monetary penalty on violators of the act other than to punish them for their actions. Imposing a monetary penalty on a person regardless of whether or not they are a public employee is punishment for the sake of punishment and retribution.

(7) Whether the sanction appears excessive when compared to the alternative purpose assigned.

In the instant case there is no alternative purpose assigned for the penalties. Therefore, the sanction is excessive on its face.

In a more recent decision, this Court revisited the issue of whether a sanction was punitive in *United States v. Ward*, 448 U.S. 242 (1980). In that case the Coast Guard assessed a civil penalty in the amount of $500.00 against the lessor of an oil drilling facility for discharging oil into navigable waters in violation of the Federal Water Pollution Control Act, 33 U.S.C. Section 1321(b)(5).

The lessor of the drilling facility argued that the reporting requirements of the Act violated his privilege against compulsory self-incrimination protected by the Fifth Amendment.

This Court stated that in determining whether the penalty was civil or criminal, the first step in the analysis is to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. Second, where this Court stated that Congress has indicated an intention to establish a civil penalty the court must inquire further whether the statutory scheme was "so punitive either in purpose or effect as to negate that intention." 448 U.S. at 248-249.

In the instant case, Section 112.317(1) provides a "civil penalty" not to exceed $5,000.00 and "restitution of any pecuniary benefits received because of the violation committed."

Regarding the second step, this Court stated that the seven considerations listed in the *Mendoza-Martinez* case are "useful" but not "dispositive" in this determination. 448 U.S. at 250.

In *United States v. Ward*, the Court held that because Congress had made criminal the precise conduct in another statute, this tended "to dilute the force of the fifth *Mendoza-Martinez* criterion . . ." leading the court to conclude that the *Mendoza-Martinez* factors were not sufficient to render unconstitutional the Congressional classification of the penalty as civil. 448 U.S. at 250, 251.

However, this Court went on to state that even if the penalty imposed upon *Ward* was clearly not "criminal" enough to trigger all of the procedural guarantees normally associated with criminal prosecutions, the question still remained whether the penalty was "quasi-criminal" and therefore sufficient to implicate the Fifth Amendment's protection against compulsory self-incrimination. 448 U.S. at 251.

This Court concluded that the penalty was not "quasi-criminal" because the penalty related to the damages sustained by society or the cost of enforcing the law and because the civil remedy and the criminal remedy were contained in separate statutes and acted 70 years apart. 448 U.S. at 254.

However, in the instant case, Section 112.313(6) does require scienter and there is no criminal counterpart to the statute. Further, the penalty of $5,000.00 has absolutely no correlation to any damages sustained by society or the cost of enforcing the law.

In *United States v. Halper*, 490 U.S. 435 (1989) this Court held that a civil penalty of $130,000 based on a $2,000 penalty on each of 65 counts constituted a second punishment or double jeopardy where the penalty bore no rational relation to the government's loss of $585.00 plus the cost of investigating and prosecuting the case. 490 U.S. at 452.

In the *Halper* case, Blue Cross had passed Halper's Medicaid overcharges along to the federal government. 490 U.S. at 437. This Court reiterated the principle that "retribution and deterrence are not legitimate non-punitive governmental objectives." 490 U.S. at 448. The Court further stated as follows:

> "A civil sanction that cannot be fairly said to solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes is punishment as we have come to understand the term." 490 U.S. at 448.

In the instant case, there was no evidence whatsoever that the State of Florida suffered any damage as a result of Petitioner's violation of Section 112.313(6). The "civil penalty" of $5,000.00 is not correlated in any way to making the State of Florida whole.

Furthermore, as has been stated, the amount or reasonableness of the penalty is not subject to judicial review which means that Petitioner did not receive as much due process as she would have in a civil proceeding in the courts of the State of Florida. Surely, it is beyond cavil that a litigant is entitled to appeal a judgment for civil damages to a higher court and to assert the excessiveness, unreasonableness or arbitrary nature of said judgment for damages. Accordingly, because the Commission on Ethics has assessed a punishment against Petitioner without the incidents of a criminal prosecution or even a civil proceeding, Petitioner's rights under the Fifth and Sixth Amendments to the incidents of a criminal prosecution and her rights under the Fourteenth Amendment to due process have been violated.

II. THE FINAL ORDER OF THE FLORIDA COMMISSION ON ETHICS CONFLICTS WITH THIS COURT'S DECISIONS REQUIRING DUE PROCESS IN ADMINISTRATIVE HEARINGS

The Final Order violated Petitioner's right to due process because the complaint filed by Carrerou and the probable cause finding alleged that Petitioner had violated Section 112.313(6), Fla. Stat., by "coercing" the Carrerous into making a loan. Neither the Recommended Order nor the Final Order contained any findings that the Petitioner engaged in "coercion". Yet, the Final Order concluded that Petitioner acted "corruptly".

The Final Order constituted a violation of her right to due process because of inadequate notice as guaranteed by due process which implies to administrative hearings under *Goldberg v. Kelly*, 397 U.S. 254 (1970), *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *Matthews v. Eldridge*, 424 U.S. 319 (1976).

Specifically, the Complaint filed by Carrerou was the Petitioner had "coerced" Carrerou into making the loan. This was the basis of the probable cause determination of the Commission and was the issue to be decided by the Hearing Officer. However, there was no finding by the Hearing Officer or the Commission that Petitioner had "coerced" Carrerou. Petitioner was not charged with "arranging" or "referring" yet that was the finding of the Hearing Officer and the Commission. Petitioner had no notice that she was defending herself against any charge other than coercion.

The violation of her right to due process was compounded by the ruling of the Florida Supreme Court and lower courts that a reviewing court is without authority to review the penalty imposed by an agency so long as the penalty imposed is within permissible range of statutory law unless an agency findings are in part

reversed.

The above decisions of this Court stand for the proposition that due process is flexible and calls for such procedural protections as the particular situation demands. In the instant case, the assessment of a penalty of this magnitude by an agency requires full judicial review. Petitioner was entitled to such review under the Fourteenth Amendment.

IMPORTANCE OF QUESTIONS PRESENTED

This case presents a question of great importance and national significance. It is undisputed that administrative agencies have become a ubiquitous part of the administration of laws in both the state and national government. These agencies regulate all manner of activities in discharging their responsibility. They are empowered to assess nominally "civil penalties" against individuals who are found to violate the laws in question. The issue presented by this case is whether a purportedly "civil penalty" is in reality a "criminal penalty" or "punishment" which requires the procedural guarantees of a criminal prosecution. If not, the issue then becomes whether the penalty is "quasi-criminal" so as to require some but not all of those protections.

The notion that a state legislature can repeal a criminal sanction contained in a statute, retain the nominally "civil penalty" and achieve an adjudication of a violation of the statute along with a total monetary penalty which is equivalent to a second degree felony without the procedural safeguards of a criminal prosecution is antithetical to concepts of due process as embodied in the United States Constitution.

When a penalty is imposed for the purpose of punishment application of the punishment must be preceded by sufficient

procedural safeguards. In the absence of such safeguards the result is that hearing officers and state administrative agencies are authorized to mete out punishments in administrative proceedings which do not provide de novo review or even adequate, meaningful judicial review on the record by a court of law. Consequently, an individual such as the Petitioner, find themselves paying the penalty of a second degree felony literally without having their "day in court." This result is particularly grievous when the individual, such as the Petitioner, is alleged to have committed a violation of law which requires a showing of scienter. Given the Florida Supreme Court's limitation on judifical review of administrative penalties the punishment in this case is never subject to judicial review. This violates due process. In short, the United States Constitution does not permit bureaucrats to assess punishments equivalent to a second degree felony without adequate procedural safeguards.

CONCLUSION

For the foregoing reasons the Final Order entered in this case conflicts with the Fifth, Sixth and Fourteenth Amendments and the decisions of this Court interpreting those Amendments. For these reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

Robert J. Shapiro*
Counsel for Petitioner
P.O. Box 270133
Tampa, Florida 33688
(813) 265-1117

* Counsel of Record

Appendix A

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JAN PARTIN,

Appellant.

v.

STATE OF FLORIDA, COMMISSION ON ETHICS

Appellee.

CASE No. 94-01060

Opinion filed July 26, 1995.
Administrative Appeal from the Florida Commission on Ethics.
Robert J. Shapiro, Tampa, for Appellant.
Peter D. Ostreich, Staff Attorney, and Phillip C. Claypool, General Counsel, Tallahassee, for Appellee.
PER CURIAM.

Affirmed.

THREADGILL, C.J., and CAMPBELL and FULMER, JJ. Concur.

Appendix B

BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

In re JAN PARTIN,)	
)	
Respondent.)	**Complaint No. 91-29**
)	**Final Order No. COE 94-12**
)	

FINAL ORDER AND PUBLIC REPORT

This matter came before the Commission on Ethics on the Recommended Order rendered in this matter on December 22, 1993 by the Division of Administrative Hearings' Hearing Officer. The Hearing Officer recommends that the Commission issue its public report and final order finding that Respondent violated Section 112.313(6), Florida Statutes. She also recommends a penalty of $1,200 restitution and $5,000 civil penalty, for a total of $6,200. The Respondent telefaxed his exceptions to the Commission on January 14, 1994 at 6:02 p.m. They were filed with the Commission on January 18, 1994 -- its next business day.

Having reviewed the Recommended Order, the Respondent's Exceptions, and the record of the public hearing of this complaint, and having heard arguments of counsel for the Respondent and the Commission's Advocate, the Commission makes the following findings, conclusions, rulings, and recommendations:

STANDARDS FOR REVIEW

Under Section 120.57(1)(b)10, Florida Statutes, an agency may reject or modify the conclusions of law and interpretations of administrative rules contained in the recommended order. However, the agency may not reject or modify the findings of fact made by the Hearing Officer unless a review of the entire record demonstrates that the findings were not based on competent, substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. See, e.g., *Freeze v. Dept. of Business Regulation*, 556 So. 2d 1204 (Fla. 5th DCA 1990); and *Florida Department of Corrections v. Bradley*, 510 So. 2d 1122 (Fla. 1st DCA 1987). Competent, substantial evidence has been defined by the Florida Supreme Court as such evidence as is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusions reached." *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957).

The agency may not reweigh the evidence, resolve conflicts therein, or judge the credibility of witnesses, because those are matters within the sole province of the hearing officer. *Heifetz v. Dept. of Business Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Consequently, if the record of the DOAH proceedings disclose any competent, substantial evidence to support a finding of fact made by the Hearing Officer, the Commission is bound by that finding.

RULINGS ON RESPONDENT'S EXCEPTIONS TO FINDINGS OF FACT

1. Respondent excepts to the last sentence of the Hearing Officer's finding which states: "In the absence of the Executive Director, she was totally responsible for the operation of the Housing Authority." Respondent argues that although the

record would support that Respondent would be in the office and take calls, etc., the record also is clear that she did not have full responsibility or authority to act in the absence of the Executive Director.

Respondent's exception is rejected. See Respondent's Exhibit No. 19. As stated by the court in *Heifetz v. Department of Business Regulation, Division of Alcoholic Beverages & Tobacco*, 475 So. 2d 1277, 1281(Fla. 1st DCA 1985):

> It is the hearing officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inference from the evidence, and reach ultimate findings of fact based on competent substantial evidence. *State Beverage Department v. Ernal, Inc.*, 115 So. 2d 566 (Fla. 3d DCA 1959). If, as is often the case, the evidence presented supports two inconsistent findings, it is the hearing officer's role to decide the issue one way or the other.

It is not our function to reweigh the evidence or to rewrite the Hearing Officer's finding as long as there is competent substantial evidence to support the finding, as there is here.

2. Respondent excepts to the Hearing Officer's findings in paragraph 2 of her Findings of Fact. Respondent argues that the conclusion is not supported by the record. For the reasons stated in paragraph 1 above, Respondent's exception is rejected.

3. Respondent excepts to the Hearing Officer's findings in paragraph 4 of her Findings of Fact. Respondent argues that while the record would support that the Carrerous had frequent

contact with the Respondent, the record also clearly shows that Respondent did not sign any of the leases with them nor was she the primary person in charge of the Section 8 program for the Housing Authority.

For the reasons set forth in paragraph 1 above, Respondent's exception is rejected. See also Transcript pp. 66-69 and 115-119.

4. Respondent excepts to the Hearing Officer's finding in paragraph 5 of her Findings of Fact. Respondent argues that the record does not support the "implication" of the fact finder that Mr. Ahmad's control of the Section 8 program was merely "formal," nor that the Carrerous' perception was reasonable. Respondent asserts that the Carrerous were told many times that Respondent was not in charge of the Section 8 program.

Initially, we note that the finding states: "As Executive Director, Ash Ahmad was the formal administrator of the Section 8 program." We do not glean any other "implications" from that statement. We find that statement also is supported by competent substantial evidence of record. See Tr. pp. 277-278. For the reasons stated in paragraph 1 above, we reject Respondent's exceptions.

5. Respondent excepts to paragraph 6 of the Hearing Officer's Findings of Fact. Respondent argues that the record does not support the finding that Respondent called Mr. Carrerou, and that the remaining findings are "seriously contradicted" in the record. Respondent contends that there is no evidence that Respondent prepared the "note in question," and the record also is clear that because Mr. Carrerou received the note given by Mr. Keaton's mother mentioning her certificate of deposit, he believed that he had security for his loan.

For the reason stated in paragraph 1 above, Respondent's exception is rejected. As stated above, it is the function of the hearing officer to resolve conflicts, to judge credibility of

witnesses, to draw permissible inferences from the evidence, and to reach ultimate findings of fact based on competent substantial evidence, as she did here. It is not our function to reweigh the evidence as there is competent substantial evidence to support the Hearing Officer's findings. Inasmuch as the Hearing Officer fulfilled her function of weighing the evidence, judging the credibility of witnesses, and drawing permissible inferences from the evidence, Respondent's exceptions are rejected.

6. Respondent excepts to paragraph 7 of the Hearing Officer's Findings of Fact. Respondent asserts that the record is disputed and that there is no "extrinsic evidence" to support a finding that there was any "untoward relationship" between the Respondent and Mr. Keaton. Respondent asserts that she loaned and gave monies to others besides Mr. Keaton, and no illicit relationship was implied thereby. Respondent also contends that the record reflects that HRS became involved in the custody dispute. She claims that at a later hearing Mr. Keaton and Ms. Marshall acted together, contrary to Respondent's belief as to what was in the best interests of the children, and that Mr. Keaton was not happy with Respondent for supporting HRS in the matter. She claims that the Hearing Officer's findings are not supported by the record.

For the reasons stated in paragraph 1 and 6 above, Respondent's exceptions are rejected.

7. Respondent excepts to paragraph 9 of the Hearing Officer's Findings of Fact. Respondent claims that Mr. Keaton asked to testify in the Federal law suit. She claims that the "implication" emanating from the Hearing Officer's use of "agree" is not supported by the record. She asserts that Ms. Ibanez, the Housing Authority's attorney, did not find Mr. Keaton to be a good witness and had no intention of using him.

For the reason stated in paragraphs 1 and 6 above,

Respondent's exception is rejected. See Tr. 23. Inasmuch as the Hearing Officer fulfilled her function of weighing the evidence, judging the credibility of the witnesses, and drawing permissible inferences from the evidence, we are not free to supplement her findings. As the Court stated in *Manasota 88, Inc. v. Tremor*, 545 So. 2d 439 (Fla. 2d DCA 1989):

> Agency fact-finding independent of and supplementary to D.O.A.H. proceedings has been specifically disapproved. *See e.g., Friends of Children v. Department of Health and Rehabilitative Services*, 504 So. 2d 1345 (Fla. 1st DCA 1987).

Whether or not Attorney Ibanez intended ultimately to use Mr. Keaton's testimony in the Federal proceeding, as Respondent contends, is immaterial to the Hearing Officer's finding.

8. Respondent excepts to paragraph 13 of the Hearing Officer's Findings of Fact and, presumably, specifically with the Hearing Officer's finding that the Carrerous were never repaid their $1200. Respondent claims that the record indicates that judgment was entered in favor of the Carrerous when they sued Mrs. Olgetree and her son, Mr. Keaton. She argues that "the law is clear that entry of a judgment pays the underlying debt and converts it into a judgment lien," and the fact that Mr. Carrerou decided to forgive the lien does not reinstate the underlying debt. [Emphasis added].

The Hearing Officer's findings are supported by substantial competent evidence of record, therefore, Respondent's exception is rejected. We also note that Respondent is incorrect in her statement of the law. "A debt reduced to judgment merges with it, and a judgment is sometimes characterized as a debt." 32 Fla Jur 2d, Judgments and Decrees, sec. 80. The entry of a judgment does not, in and of itself, "pay" anything.

9. Respondent excepts to paragraph 14 of the Hearing Officer's Findings of Fact. Respondent argues that although the Hearing Officer's finding technically is correct, the record does not reflect any intention for Mr. Keaton to be a witness in the federal case.

For the reasons stated in paragraph 1 and 6 above, Respondent's exception is rejected. There is competent substantial evidence of record to support the Hearing Officer's findings.

10. Respondent excepts to paragraph 15 of the Hearing Officer's Findings of Fact. Respondent argues that the greater weight of the evidence does not establish that Respondent had any motive beyond that of helping one of the residents or the children of the client. She argues further that Respondent was concerned for the children of April Marshall far more than she was concerned for Mr. Keaton. She claims that Mr. Keaton had not wanted to take the children from Ms. Marshall, but that, she felt that he was a better parent than their mother.

Because there is competent substantial evidence of record to support the Hearing Officer's findings and, in making her findings, the Hearing Officer properly fulfilled her function of judging the credibility of the witnesses, weighing the evidence, and drawing permissible inferences therefrom, Respondent's exception is rejected.

RULING ON RESPONDENT'S EXCEPTIONS TO CONCLUSIONS OF LAW

11. Respondent excepts to the Hearing Officer's conclusion at paragraph 19 of the Recommended Order that the greater weight of "credible" evidence established that Respondent used her official position in order to obtain a loan from the Carrerous to benefit a man with whom she was intimately involved. Respondent argues initially that the conclusion that Respondent

was motivated by any relationship to Mr. Keaton is not supported by the facts. Because Respondent attempts to reargue that facts as found by the Hearing Officer in paragraph 15 of her Findings of Fact, which we already have determined to be supported by competent substantial evidence of record and from which permissible inferences were derived by the Hearing Officer, Respondent's exception is rejected.

Next, Respondent argues that there is no basis to believe that Respondent had any corrupt intent. Here, Respondent confuses the terminology of Section 112.313(6), Florida Statutes. An element of a Section 112.313(6), Florida Statutes, violation is that the public officer or employee "corruptly" used or attempted to use her official position. "Corruptly is defined at Section 112.313(9), Florida Statutes, to mean

> done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his public duties.

We find that the Hearing Officer correctly concluded that the "wrongful intent" required for Respondent to have acted "corruptly" is "determined from "the circumstance surrounding (Respondent's) relationship with Keaton and the Carrerous' relationship with the Housing Authority." Therefore, Respondent's exception is rejected.

Respondent also argues that Respondent received no personal gains. However, for a violation of Section 112.313(6), Florida Statutes, to exist, the Respondent would have to corruptly use or attempt to use her official position or any property or resource which may be within her trust, or perform her official duties, to secure a special privilege, benefit, or exemption for herself or others. Inasmuch as the Hearing Officer concluded that

Respondent used her official position to secure a loan for the benefit of Mr. Keaton, "a man with whom she was intimately involved," we find that the Hearing Officer correctly concluded that the element of Respondent's actions having been done to secure a special privilege, benefit, or exemption for herself or others was proved. Respondent's exception, therefore, is rejected.

Respondent argues further that the definition of "corruptly" does not disallow helping others. She argues that the Hearing Officer's conclusion does not find Respondent's acts to have been "inconsistent with the proper performance" of her public duties. This exception also is rejected. Contrary to Respondent's assertion is the Hearing Officer's finding in paragraph 15 of her Findings of Fact that the referral of Timothy Keaton for a loan to a landlord in a housing authority program was not within the scope of the appropriate function of the Housing Authority staff to refer tenants and other members of the public to other social service agencies or resources. In light of this finding, we conclude that Respondent's arranging a loan for Mr. Keaton from Mr. Carrerou was inconsistent with the proper performance of her public duties. Therefore, inasmuch as the Hearing Officer found that Respondent acted with wrongful intent to obtain a benefit (the loan from Mr. Carrerou for Mr. Keaton) and that her actions were inconsistent with the proper performance of her public duties, we conclude that Respondent acted "corruptly" within the meaning of Section 112.312(9), Florida Statutes, and that the Hearing Officer correctly concluded that the Respondent violated Section 112.313(6), Florida Statutes.

Respondent's remaining exceptions to this conclusion also are rejected because they are attempts to reargue facts and inferences derived from those facts which we have found to have been supported by competent substantial evidence of record.

12. Respondent excepts to paragraph 21 of the Hearing Officer's conclusion that under Section 112.317, Florida Statutes,

the suggested penalty of restitution and a $5,000.00 fine are appropriate. Respondent argues that the penalty is out of proportion to any offense that may have to be proved. She also argues that requiring her to pay "restitution" when the debt has been paid by judgment is unconscionable. She argues that Mr. Carrerou elected his remedy by suing on the note.

We disagree. See paragraph 8 above. Respondent's exception therefore is rejected.

FINDINGS OF FACT

Upon review of the record before us, we conclude that the findings of the Hearing Officer are based upon competent substantial evidence and that the D.O.A.H. proceedings complied with the essential requirements of law. Therefore, the Findings of Fact set forth in the Recommended Order are approved, adopted, and incorporated herein by reference.

CONCLUSIONS OF LAW

The conclusions of law, except as modified in paragraph 11 above to add the conclusion that Respondent's actions were inconsistent with the proper performance of her public duties, are approved, adopted, and incorporated herein by reference.

Accordingly, the Commission on Ethics finds that the Respondent violated Section 112.313(6), Florida Statutes.

RECOMMENDED PENALTY

The Hearing Officer recommended that Respondent be required to pay a penalty of $1,200 restitution and a civil penalty of $5,000, for a total of $6,200. We find her recommendation to be appropriate.

Having found that the Respondent, Jan Partin, as

Administrative Assistant to the Winter Haven Housing Authority's Executive Director, violated Section 112.313(6), Florida Statutes, it is the recommendation of the Commission on Ethics that a penalty of restitution of $1,200 and a civil penalty of $5,000 be imposed upon the Respondent, for a total of $6,200.

ORDERED by the State of Florida Commission on Ethics meeting in public session on March 10, 1994.

March 15, 1994
Date Rendered

Joel K. Gustafson
Joel K. Gustafson
Chairman

THIS ORDER CONSTITUTES FINAL AGENCY ACTION. ANY PARTY WHO IS ADVERSELY AFFECTED BY THIS ORDER HAS THE RIGHT TO SEEK JUDICIAL REVIEW UNDER SECTION 120.68, FLORIDA STATUTES, BY FILING A NOTICE OF ADMINISTRATIVE APPEAL PURSUANT TO RULE 9.110 FLORIDA RULES OF APPELLATE PROCEDURE, WITH THE CLERK OF THE COMMISSION ON ETHICS, 2822 REMINGTON GREEN CIRCLE, SUITE 101, P.O. DRAWER 15709, TALLAHASSEE, FLORIDA 32317-5709; AND BY FILING, A COPY OF THE NOTICE OF APPEAL ACCOMPANIED BY THE APPLICABLE FILING FEES WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, THE NOTICE OF ADMINISTRATIVE APPEAL MUST BE FILED WITHIN 30 DAYS OF THE DATE THIS ORDER IS RENDERED.

cc: Mr. Robert Grizzard, II, Attorney for Respondent
Ms. Claire Dryfuss, Acting Commission Advocate

Mr. and Mrs. Oswald Carrerou, Complainants
Honorable Mary Clark, Hearing Officer
Division of Administrative Hearings

Appendix C

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: JAN PARTIN	)	
	)	**CASE NO. 92-7318EC**
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to the notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Mary Clark, held a formal hearing in the above-styled case on July 8, 1993, in Winter Haven, Florida.

APPEARANCES

For the Advocate, Florida Commission on Ethics:	Claire D. Dryfuss, Esquire Acting Advocate Commission on Ethics Office of the Attorney General The Capital, PL-01 Tallahassee, Florida 32399-1050
For Respondent:	Robert H. Grizzard, II, Esquire Post Office Box 992 Lakeland, Florida 33802-0992

STATEMENT OF THE ISSUES

On December 6, 1991 the Florida Commission on Ethics found probable cause that Jan Partin, while employed as Administrative Assistant to the Winter Haven Housing Authority's Executive Director violated section 112.313(6), F.S. by coercing a Mr. and Mrs. Carrerou into making a loan to a potential witness in a federal court trial involving the Housing Authority and by representing to the Carrerous that the Housing Authority would repay the loan.

The issue for disposition in this proceeding is whether that violation occurred, and if so, what penalty is appropriate.

PRELIMINARY STATEMENT

The order finding probable cause was forwarded to the Division of Administrative Hearings on December 7, 1992 with a request to conduct a public hearing and provide a recommended order to the Commission.

After consultation with the parties, the hearing was scheduled for April 22, 1993. It was cancelled, at the parties' request, when settlement appeared likely, but the hearing was reset when the informal resolution did not materialize. The hearing then proceeded as set forth above.

At the hearing the Acting Advocate presented testimony of the following: Timothy Keaton, Oswald Carrerou, Leah Carrerou and Katherine Reddick. The following Advocate's exhibits were received in evidence: #P-1, #P-4, #P-6 through #P-10.

Respondent testified in her own behalf and presented the testimony of Katherine Reddick, Sylvia Ibanez, James Lear, Herbert Lopez and Lovett Johnson. Respondent's exhibits #1, #2, #3, #4, #13, and #19 were received in evidence.

The transcript was filed on August 2, 1993 and the Acting Advocate filed a proposed recommended order on September 2, 1993. Her proposed findings of fact are substantially adopted here.

FINDINGS OF FACT

1. Respondent, Jan Partin (Partin), during all times relevant to this proceeding, was the administrative assistant to the executive director of the Winter Haven Housing Authority, in Winter Haven, Florida. In that capacity she exercised responsible administrative, supervisory and technical management functions in assisting the executive director. In the absence of the executive director, she was totally responsible for the operation of the housing authority.

2. Oswald and Leah Carrerou, husband and wife, owned rental property in Winter Haven, and in 1989 and 1990 were landlords in the housing authority's Section 8 program, a program funded by the U.S. Department of Housing and Urban Development (HUD) to provide rental assistance to eligible tenants. The Carrerous were the second landlords brought into the authority's program, and in late 1989, early 1990, had more tenants than other landlords in the program.

3. As Section 8 landlords, the Carrerous received monthly checks from the housing authority. In January and February 1990, those checks were $3,512.00 and $3,810.00, respectively, representing approximately sixty percent of the Carrerou's total rental income at that time.

4. The Carrerou's primary staff contact with the housing authority with regard to the Section 8 Program was Jan Partin. This included contacts regarding tenants, leases, landlord/housing authority contracts, and rental payments. As it was a new program, the contacts were frequent, several times a week, by telephone and in person at the housing authority office.

5. As executive director, Ash Ahmad was the formal

administrator of the Section 8 Program. Ahmad trained Partin and another staff person in the program and Partin's contacts with the Carrerous were part of her routine functions. The Carrerou's perception that she had some control over their continued participation and receipt of rents was reasonable, even if not technically nor legally correct.

6. In early 1990, Partin called Oswald Carrerou and asked if he would consider making a loan to a person who was very important to the housing authority, a witness in a federal case involving a tenant. Partin said the person needed money to pay his lawyer in a child custody dispute. Carrerou was concerned about the appearance and legitimacy of the transaction. He was not in the business of making personal loans, except in the context of his buying and selling real estate, in which cases the loans were secured by a mortgage. When he asked about collateral, Partin said something about a CD coming due and that he would be paid off then. Partin suggested that a note would be prepared, but did not say who would sign the note. Reluctantly, and with the concern that he had little choice, given his financial circumstances and reliance on the Section 8 rents, Carrerou agreed to the loan.

7. Timothy Keaton was the person who was to receive the loan. Keaton met Partin in 1988 when his girlfriend, April Marshall, was living in a Winter Haven Housing Authority housing project. Keaton lived with Marshall off and on without being included in the lease; the couple had two children together. Keaton and Partin developed a close personal relationship and they began dating; Partin loaned and gave him money. Partin became involved in a custody dispute regarding the Keaton/Marshall children, a case which also involved the Department of Health and Rehabilitative Services. Partin urged Keaton to hire a lawyer to get custody away from Marshall and she recommended a lawyer to him. This was the lawyer to whom the loan money was to be paid.

8. At the same time that the custody dispute was pending, the housing authority was sued in federal court by Keaton's sometime girlfriend, Marshall, and other plaintiffs who were contesting their evictions. Partin was the legal liaison for the housing authority and worked closely with Sylvia Ibanez, the attorney for the housing authority in the Marshall lawsuit and other litigation.

9. Keaton agreed to testify against Marshall and on behalf of the housing authority in the federal case. He gave a deposition attended by Partin, Attorney Ibanez and Marshall's attorney. This was around the same time that Partin sought the loan to pay Keaton's lawyer.

10. Keaton and another man appeared at Carrerou's office with a note signed by Keaton's mother, Oreatha K. Ogletree, dated February 16, 1990. The note stated that she would be responsible for the loan of $1,200 to her son, and that she would make the payment in March 1990, when her CD matured. After assuring himself that the lawyer was indeed representing Keaton, and the Oreatha K. Ogletree was Timothy Keaton's mother, Oswald Carrerou gave Keaton a check for $1,200 payable to Robert Doyel, the attorney. The check is dated February 16, 1990. Carrerou had never met nor seen Keaton before that day. Because of cash flow problems, Carrerou borrowed the $1,200 from his wife's VISA credit card account at 18% interest in order to make the loan to Keaton.

11. Keaton did not sign the note, although there was a space on the note for his signature and social security number. Moreover, instead of taking the check to the lawyer's office that afternoon as was arranged, he tore it into three pieces. He did not want to be responsible for the money and did not want his mother

to be responsible either.

12. Sometime later, but before the end of February 1990, Partin called Leah Carrerou and told her that the Keaton children had spilled something on the check or had torn it, and that another check was needed immediately. Keaton had an appointment with the lawyer that afternoon and the lawyer would not see him without the check. Partin said she would send someone over to pick it up, and someone from the Housing Authority did come to get the check from Mrs. Carrerou. Later, Mrs. Carrerou realized her check was written on the wrong account and, after speaking to the lawyer's secretary for approval, she mailed a substitute check for $1,200, dated February 28, 1990, to Robert Doyel.

13. The Carrerous were never repaid their $1,200. After the end of thirty days, Leah Carrerou called Partin, who assured that she would get her money. After about five of six subsequent similar calls, the Carrerous sued Oreatha Ogletree on the note. A final judgment in favor of Oswald Carrerou was entered on July 9, 1990, by Polk County Judge, Harvey A. Kornstein. Later, Oswald Carrerou filed a satisfaction of that judgment when he learned that Timothy Keaton had torn up his original check to avoid binding himself or his mother. Keaton believed that Jan Partin had come up with the money for the lawyer. Keaton did not know that Partin had obtained another check from the Carrerous.

14. The federal case was eventually settled without the need for Keaton to testify at a trial. Meanwhile, Keaton got back together with April Marshall and appeared at the custody hearing on her side.

15. Commonly, and within the Housing Authority's function of providing services to tenants or other members of the public, housing authority staff make referrals to other social service

agencies or resources. The referral of Timothy Keaton to a landlord in a housing authority program was not within the scope of that appropriate function. The greater weight of evidence established that it was Partin's romantic relationship with Keaton, rather than any eleemosynary impulse that motivated her misguided efforts on his behalf.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction in this proceeding pursuant to section 120.57(1), F.S., and Florida Commission on Ethics rule 34-5.010, F.A.C.

17. Section 112.3(6), F.S., provides:

> (6) MISUSE OF PUBLIC POSITION. -- No public officer or employee of an agency shall corruptly use or attempt to use his official position of any property or resource which may be within his trust, or perform his official duties, to secure a special privilege, benefit, or exemption for himself or others. This section shall be not construed to conflict with s. 104.31.

"Corruptly" is defined in Section 112.312(9), F.S.:

> (9) "Corruptly" means done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his public duties.

18. Jan Partin was, at the time of the incident at issue, an

"employee of an agency" as provided in Sections 112.313(6), F. S., and 112.312(2), F.S.

19. The greater weight of credible evidence established that Jan Partin used her official position in order to obtain a loan from the Carrerous to benefit a man with whom she was intimately involved. That he was also a witness for the housing authority provided the excuse, but not the lawful justification, for her pressure on the Carrerous. Her wrongful intent is determined from the circumstances surrounding her relationship with Keaton and the Carrerou's relationship with the housing authority. The Acting Advocate proved the first violation of Section 112.313(6), F. S., by Jan Partin.

20. The order finding probable cause states also that Partin represented to the Carrerous that the Housing Authority would repay the loan. That was not proven. At most, the evidence established that Jan Partin kept assuring the landlords that the loan would be repaid. The Carrerous could have inferred that the money would be repaid. The Carrerous could have inferred that the housing authority itself was going to provide the payment, but no evidence established that Jan Partin made that specific representation.

21. The acting advocate has suggested a penalty of restitution and a fine of $5,000 for each violation. Section 112.317, F. S., establishes the types of penalties which may be imposed for violations of the code of ethics, which penalties vary in some regard, depending on whether the individual is still employed or is a public officer. The evidence here did not establish Ms. Partin's current status, but only her status during the relevant period. The penalties suggested by the Acting Advocate are appropriate under Section 112.317, F.S., for both existing and former officers or employees and are, therefore, incorporated in this recommendation.

RECOMMENDATION

Based on the foregoing, it is, hereby,

RECOMMENDED:

That the Commission on Ethics enter its final order finding that Jan Partin violated section 112.313(6), F.S., and recommending restitution in the amount of $1200 and a civil penalty of $5000.

DONE AND RECOMMENDED this 22nd day of December, 1993, in Tallahassee, Leon County, Florida.

MARY CLARK

MARY CLARK
Hearing Officer
Division of Administrative Hearings
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Filed with the Clerk of the Division of Administrative Hearings this 22nd day of December, 1993.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.

Appendix D

ARTICLE V

No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or navy forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

ARTICLE XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix E

112.311 Legislative Intent and declaration of policy.-

(1) It is essential to the proper conduct and operation of government that public officials be independent and impartial and that public office not be used for privategain other than the renumeration provided by law. The public interest, therefore, requires that the law protect against any conflict of interest and establish standards for the conduct of elected officials and government employees in situations where conflicts may exist.

(2) It is also essential that government attract those citizens best qualified to serve. Thus, the law against conflict of interest must be so designed as not to impede unreasonably or unnecessarily the recruitment and retention by government of those best qualified to serve. Public officials should not be denied the opportunity, available to all other citizens, to acquire and retain private economic interests except when conflicts with the responsibility of such officials to the public cannot be avoided.

(3) It is likewise essential that the people be free to seek redress of their grievances and express their opinions to all government officials on current issues and past or pending legislative and executive actions at every level of government. In order to preserve and maintain the integrity of the governmental process, it is necessary that the identity, expenditures, and activities of those persons who regularly engage in efforts to persuade public officials to take specific actions, either by direct communication with such officials or by solicitation of others to engage in such efforts, be regularly disclosed to the people.

(4) It is the intent of this act to implement these objectives of protecting the integrity of government and of facilitating the recruitment and retention of qualified personnel by prescribing restrictions against conflicts of interest without creating unnecessary barriers to public service.

(5) It is hereby declared to be the policy of the state that no officer or employee of a state agency or of a county, city or other political subdivision of the state, and no member of the Legislature or legislative employee, shall have any interest, financial or otherwise, direct or indirect; engage in any business transaction or professional activity; or incur any obligation of any nature which is in substantial conflict with the proper discharge of his duties in the public interest. To implement this policy and strengthen the faith and confidence of the people of the state in their government, there is enacted a code of ethics setting forth standards of conduct required of state, county, and city officers and employees, and of officers and employees of other political subdivisions of the state, in the performance of their official duties. It is the intent of the Legislature that this code shall serve not only as a guide for the official conduct of public servants in this state, but also as a basis for discipline of those who violate the provisions of this part.

(6) It is declared to be the policy of the state that public officers and employees, state and local, are agents of the people and hold their positions for the benefit of the public. They are bound to uphold the Constitution of the United States and the State Constitution and to perform efficiently and faithfully their duties under the laws of the federal, state, and local governments. Such officers and employees are bound to observe, in their official acts, the highest standards of ethics consistent with this code and the advisory opinions rendered with respect hereto regardless of personal considerations, recognizing that promoting the public interest and maintaining the respect of the people in their government must be of foremost concern.

Appendix F

112.313 Standards of conduct for public officers and employees of agencies.-

(6) MISUSE OF PUBLIC POSITION -- No public officer or employee of an agency shall corruptly use or attempt to use his official position or any property or resource which may be within his trust, or perform his official duties, to secure a special privilege, benefit, or exemption for himself or others. This section shall not be construed to conflict with s. 104.31.

Appendix G

112.312 Definitions.- As used in this part and for purposes of the provisions of s. 8, Art. II of the State Constitution, unless the context otherwise requires.

(9) "Corruptly" means done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his public duties.

Appendix H

112.317 Penalties.-

(1) Violation of any provision of this part, including but not limited to, any failure to file any disclosures required by this part, or violation of any standard of conduct imposed by this part, or violation of any provision of s. 8, Art. II of the State Constitution, in addition to any criminal penalty or other civil penalty involved, shall, pursuant to applicable constitutional and statutory procedures, constitute grounds for, and may be punished by one or more of the following:

(d) In the case of a former public officer or employee who has violated a provision applicable to former officers or employees or whose violation occurred prior to such officer's or employee's leaving public office or employment:

1. Public censure and reprimand.
2. A civil penalty not to exceed $5,000.
3. Restitution of any pecuniary benefits received because of the violation committed.

(2)

Supreme Court, U.S.
FILED
NOV 22 1995
OFFICE OF THE CLERK

Docket No. 95-683

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

JAN PARTIN,

Petitioner,

v.

STATE OF FLORIDA
COMMISSION ON ETHICS,

Respondent.

On Petition For Writ of Certiorari To The State of Florida District Court of Appeal For The Second District

RESPONDENT'S BRIEF IN OPPOSITION

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23 pp

QUESTIONS PRESENTED

I. Whether Petitioner's failure to timely raise her constitutional claims barred state court review and serves as an adequate and independent state ground for the Florida appellate court's decision.

II. Whether Petitioner has demonstrated that the Florida appellate court's decision incorrectly resolved any federal questions regarding her rights under the Fifth, Sixth, and Fourteenth Amendments to the U. S. Constitution.

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STATEMENT OF THE CASE

This matter comes to the Supreme Court on an order of the Second District Court of Appeal of Florida affirming without opinion Respondent's administrative order concluding that Petitioner misused her public position, as Administrative Assistant to the Executive Director of the City of Winter Haven Housing Authority, in violation of Section 112.313(6), Florida Statutes. Section 112.313(6) prohibited Petitioner from corruptly using her official position or performing her official duties to secure a special privilege, benefit, or exemption for herself or another.

This statute is one of the standards of conduct applicable to public officers and employees in Florida; the standards are contained in the state's Code of Ethics for Public Officers and Employees, which is codified as Part III, Chapter 112, Florida Statutes. Respondent is the body charged with investigating complaints alleging violations of these state ethics laws. Section 112.322 and 112.324, Florida Statutes. Respondent's proceedings are governed by the state's Administrative Procedure Act, Chapter 120, Florida Statutes.

The case arose from a sworn complaint filed with the Respondent in March 1991, by Oswald and Leah Carrerou, landlords with the Winter Haven Housing Authority's Section 8 program, which provides rental assistance to eligible tenants. After conducting an investigation, which included a voluntarily-given interview with the Petitioner in a non-custodial setting, at which her attorney was present, the Respondent determined that there was probable cause to believe that Petitioner, while employed as Administrative Assistant, violated Section 112.313(6), Florida Statutes, by

coercing the Carrerous into making a loan to Timothy Keaton, a potential witness in a federal court trial involving the Housing Authority, and by representing to the Carrerous that the Housing Authority would repay the loan.

The matter was tried before a state administrative law hearing officer, not affiliated with the Respondent, who rendered a recommended order [Petitioner's Appendix C, pp. 14a-23a.], recommending that the Respondent enter a final order finding that Petitioner violated Section 112.313(6). The hearing officer concluded that Petitioner used her official position in order to obtain a loan from the Carrerous to benefit Timothy Keaton, a man with whom she was intimately involved. Although Petitioner testified that she merely had given Keaton the names of three individuals who might lend him money, the hearing officer found otherwise:

> In early 1990, [Petitioner] called Oswald Carrerou and asked if he would consider making a loan to a person who was very important to the Housing Authority, a witness in a federal case involving a tenant. [Petitioner] said the person needed money to pay his lawyer in a child custody dispute. Carrerou was concerned about the appearance and legitimacy of the transaction. He was not in the business of making personal loans, except in the context of his buying and selling real estate, in which cases the loans were secured by a mortgage. When he asked about collateral, [Petitioner] said something about a CD coming due and that he would be paid off then. [Petitioner] suggested that a note would be prepared, but did not say who would sign the note. Reluctantly, and with the concern

> that he had little choice, given his financial circumstances and reliance on the Section 8 rents, Carrerou agreed to the loan. [Petitioner's Appendix C, p. 17a.]

The Hearing Officer concluded further that Petitioner had acted with wrongful intent, an element necessary for finding a violation of Section 112.313(6), based upon Carrerou's dependence on the Housing Authority as a landlord and the circumstances surrounding Petitioner's relationship with Keaton, including their dating, her involvement in his child custody dispute, her loaning money to him, her urging him to hire a lawyer to get custody of his children away from their mother, who also was a Housing Authority tenant and plaintiff in the federal lawsuit against the Housing Authority, and Petitioner's calling Mrs. Carrerou for another check to pay the attorney even though she knew that Keaton had torn up the first check to avoid responsibility for repaying the loan. [Petitioner's Appendix C, pp. 16a-21a.]

Throughout the proceedings, Petitioner was represented by counsel. She had the opportunity to engage in discovery, to present evidence and argument on all issues involved, to subpoena witnesses, to conduct cross-examination and submit rebuttal evidence, and to submit proposed finding of facts and conclusions of law. See Sections 120.57(1)(b)4 and 120.58(1)(b), Florida Statutes. Petitioner was called to testify by her own counsel, did so voluntarily, and presented six exhibits and the testimony of five witnesses. [Petitioner's Appendix C, p. 15a.]

The hearing officer, pursuant to Section 112.317(1)(d), Florida Statutes (1993), recommended a penalty of restitution in the amount of $1,200 and a civil

penalty of $5,000. Section 112.317(1)(d) specifies that penalties for violating the Code of Ethics could include, in addition to a civil penalty not exceeding $5,000, "[r]estitution of any pecuniary benefits received because of the violation committed."

Petitioner's attorney filed written exceptions to the recommended order, which were considered in detail and rejected by Respondent. None of her exceptions argued that she had been denied the due process protections granted for criminal proceedings or raised any question about whether she had been provided with adequate notice of the allegations against her. [Petitioner's Appendix B, pp. 2a-11a.]

The Respondent's final order adopted the hearing officer's findings of fact, conclusions of law, and recommended penalty. In doing so, Respondent concluded that in light of the hearing officer's finding that the referral of Keaton for a loan to the Carrerous was not within the scope of the appropriate function of the Housing Authority staff, Petitioner's arranging the loan was inconsistent with the proper performance of her public duties. Also, the Respondent concluded that, as the hearing officer found that Petitioner acted with wrongful intent to obtain a benefit for Keaton and as Respondent concluded that her actions were inconsistent with the proper performance of her public duties, Petitioner acted "corruptly" within the meaning of Section 112.312(9), Florida Statutes.

Petitioner appealed this final order to the State of Florida Second District Court of Appeal. Her first four points on appeal were directed at evidentiary rulings made by the hearing officer and at the question of whether competent substantial evidence supported various findings. Her final two points on appeal argued the issues she asks this Court to

review. After oral argument, the District Court of Appeal affirmed, without opinion.

REASONS TO DENY THE WRIT

I. Petitioner's failure to timely raise her constitutional claims barred state court review and serves as an adequate and independent state ground for the Florida appellate court's decision.

Petitioner seeks review of a state court decision which disposed of her claims without a written opinion. Notwithstanding the assertions in her Petition for Writ of Certiorari, there is nothing to indicate that the state court considered or passed on the federal question. Instead, the record below indicates that Petitioner never raised her claims in the proceedings before the Commission and waited until the filing of her appellate brief to allege any such defects. Under Florida law, an administrative agency cannot be deemed to have erred by failing to act as to matters that are not brought to its attention until the filing of an appellate brief. *Florida Department of Corrections v. Bradley*, 510 So. 2d 1122 (Fla. 1st DCA 1987); *Environmental Coalition of Florida, Inc. v. Broward County*, 586 So. 2d 1212 (Fla. 1st DCA 1991); and *Couch v. Commission on Ethics*, 617 So. 2d 1119 (Fla. 5th DCA 1993).

As Respondent argued below in response to Petitioner's due process claim (Point V of Petitioner's initial brief to the Second District Court of Appeal):

> This issue is raised for the first time in this proceeding on appeal. As this argument was

> not included in [Petitioner's] exceptions to the Hearing Officer's Recommended Order, she is foreclosed from raising the argument for the first time before this Court. *Florida Department of Corrections v. Bradley, supra*; *Environmental Coalition of Florida, Inc. v. Broward County, supra*; and *Couch v. Commission on Ethics, supra.*

[Commission's answer brief to the Second District Court of Appeal, p.41]

With regard to Petitioner's contention that Section 112.313(6), Florida Statutes, was unconstitutional because it imposed criminal punishment without the procedural safeguards of a criminal prosecution (Point VI of Petitioner's initial brief to the Second District Court of Appeal), the Commission responded:

> [Petitioner] never sought any of the procedural safeguards below that she now argues she was entitled to because of the alleged "criminal" nature of the allegations brought against her. She testified at hearing and never asserted a right to remain silent under the 5th Amendment; she never asserted the proceedings were invalid because no state attorney filed an information and no grand jury indicted her; she never asked for a jury trial; she never demanded conviction by a court; and she never argued that the civil penalties provided for in Section 112.317(1), Fla. Stat., were criminal. Although she now apparently seeks to argue ineffective assistance of counsel below, her half-hearted

> effort is limited to one and a half lines in a footnote in her brief. (I.B. 49) Questions not timely raised and ruled upon below should not be considered on appeal. 3 Fla. Jur. 2d, *Appellate Review*, § 92, and cases cited therein.

[Commission's answer brief to the Second District Court of Appeal, p.47]

In *Coleman v. Thompson*, 501 U. S. 722 (1991), *reh. den.*, 501 U.S. 1277 (1991), this Court reiterated that it would not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment, citing *Fox Film Corp. v. Muller*, 296 U. S. 2017 (1935); and *Klinger v. Mississippi*, 13 Wall. 257 (1872). The Court opined further that the rule applies whether the state law ground is substantive or procedural, again citing *Fox Film*, *supra*, and *Herndon v. Georgia*, 295 U. S. 441 (1935). In the context of direct review of a state court judgment, the independent and adequate basis doctrine is jurisdictional. *Coleman*, *supra*. Although *Coleman* involved a federal habeas proceeding and is factually distinguishable from the matter presented here, its holding that a procedural bar in a state court proceeding constitutes an independent and adequate state ground to deny habeas relief in federal court should likewise be applied here.

Further, *Illinois v. Gates*, 462 U. S. 213 (1983), applied a "not pressed or passed on below" rule to hold that if both of the requirements that a federal question had been raised and decided in the state court below do not appear on the record, the appellate jurisdiction of the Supreme Court fails. See also, *Michigan v. Long*, 463 U. S. 1032 (1983),

where the Court adopted a conclusive presumption of jurisdiction only when a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion.

Without a written opinion from the Second District Court, it cannot be concluded that it appears in the record that the state court decided the federal questions asserted by Petitioner. Nor can it be said that the state court's *per curiam* affirmance rested primarily on federal law or was so interwoven with federal law as to bring it within the jurisdiction of this Court.

Thus, Petitioner's failure to timely raise her claims constituted an adequate state ground for the Second District Court of Appeal's affirmance of the Commission's final order and bars this Court's review of that decision.

II. Petitioner has not demonstrated that the Florida appellate court's decision incorrectly resolved any federal questions regarding her rights under the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution.

Even if this Court concludes that Petitioner's procedural default was not an adequate and independent state ground to bar its jurisdiction, Petitioner has made no showing that the state appellate court failed to protect her constitutional rights relative to the administrative proceedings below.

Petitioner essentially presents two arguments to support her claim that Respondent's actions amounted to unconstitutional deprivations of her Fifth, Sixth, and Fourteenth Amendment rights: (a) that Respondent's proceedings were, in effect, a criminal prosecution, entitling her to the same procedural protections as provided in any criminal prosecution, including judicial review of the reasonableness or amount of the penalty; and (b) that she was denied due process because of an alleged variance between the charges and the Respondent's findings.[1]

A. Procedural Safeguards of Criminal Prosecution

Petitioner argues that the assessment of civil monetary penalties pursuant to Section 112.317, Florida Statutes (1991), constitutes the imposition of criminal punishment without the procedural safeguards of a criminal prosecution. She argues that the Respondent has imposed[2] criminal punishment without providing the procedural safeguards of a criminal prosecution. This argument fails, however, for the following reasons: (1) the Florida courts have concluded that Commission on Ethics proceedings and Code of Ethics provisions are civil and not criminal; (2) Petitioner never sought at the trial level any of the procedural safeguards that she now argues she was entitled to; and (3) Commission on

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[1]Although Petitioner sought to raise a Seventh Amendment jury trial issue before the state appellate court, she no longer asserts any argument regarding the Seventh Amendment. See Petitioner's Petition, pp. 12 and 24.

[2]Note that, pursuant to § 112.324(7), Fla. Stat., the Respondent cannot impose any penalty; it can only recommend. See *Commission on Ethics v. Sullivan*, 489 So. 2d 10 (Fla. 1986).

Ethics proceedings are not criminal and are no more criminal in nature than any other administrative proceeding that may result in disciplinary action.

Self Incrimination

Petitioner agreed to be interviewed by the Respondent's investigator and she voluntarily testified at the hearing. Petitioner did not assert a right to remain silent under the 5th Amendment until her initial brief was filed before the state appellate court. Therefore, any discussion of Petitioner's rights against self-incrimination would be purely academic at this point, since she was represented by counsel at all stages of these proceedings and was not compelled to give any testimony against herself.

Furthermore, Petitioner has cited no judicial decision holding that administrative proceedings such as the Commission's are criminal. Of particular note is *U.S. v. Ward*, 448 U.S. 242, *reh. den.*, 448 U.S. 916 (1980), where this Court held that the use of an oil spill report required under the Federal Water Pollution Control Act to support the assessment of a civil penalty for a spill, was not violative of the Fifth Amendment. There, the civil penalty was a maximum of $5,000 per violation, subsequently amended to a $50,000 cap. *Id.*, 448 U.S. at 245. Under the two-part test established in *Ward*, the first determination is whether the legislative body (there, Congress) in establishing a penalizing mechanism, indicated expressly or impliedly a preference for the civil or criminal label. The second part of the *Ward* test, where Congress has indicated an intention to establish a civil penalty, requires the Court to determine whether there is the "clearest proof" that the statutory scheme was so punitive either in purpose or effect as to negate the legislative intention. *Id.*, 448 U.S. at 249.

In *Ward, supra*, this Court found that Congress intended to impose a civil penalty upon persons in Ward's position, that is, that Congress intended to allow the imposition of penalties under the Act without regard to the procedural protections and restrictions available in criminal prosecutions. *Id.*

Similarly, there can be no doubt that the Florida ethics scheme was intended to impose civil penalties without regard to the procedural protections and restrictions available in criminal prosecutions. Penalties for violations of administrative-type laws clearly are permitted under the Florida Constitution, which provides: "No administrative agency shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law." Article I, Section 18, Florida Constitution. Section 112.317(1), Florida Statutes, provides for the penalties that have been recommended in this case. Moreover, in *Tenney v. State Commission on Ethics*, 395 So. 2d 1244 (Fla. 2d DCA 1981), a case involving procedural due process and vagueness issues, the court recognized that Ethics Commission proceedings involve civil penalties rather than criminal penalties. The Florida Supreme Court also has concluded that Section 112.313 does not entail criminal penalties. *D'Alemberte v. Anderson*, 349 So. 2d 164, at p. 168 (Fla. 1977).

Applying the second part of the *Ward* test, this Court found that the factors in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), referenced by Petitioner, were not sufficient to render unconstitutional the civil penalty established by Congress in the Federal Water Pollution Control Act (maximum $5,000). *Ward, supra*, 448 U.S. at 250-251. In other words, the sanctions Congress provided were held not to be so punitive as to "transform what was clearly intended

as a civil remedy into a criminal penalty." *Id.*, 448 U.S. at 249, quoting *Rex Trailer Co. v. United States,* 350 U.S. 148, 154 (1956).

If the $5,000 civil penalty (subsequently raised to $50,000) were not so punitive as to transform the civil penalty in *Ward* to a criminal penalty, the $5,000 maximum civil penalty and the $1,200 restitution penalty recommended by the Respondent are not so punitive as to transform these civil remedies into a criminal penalty.

Due Process (Judicial Review of Recommended Penalty)

Petitioner argues that her due process rights were violated because she had no right to judicial review of the recommended penalty. She correctly argues that as long as the penalty imposed by a Florida agency is within the permissible range of statutory law and its findings have not been modified, a reviewing court is without authority to review the reasonableness of the penalty imposed by the agency. *Florida Real Estate Commission v. Webb,* 367 So. 2d 201 (Fla. 1979); *LaRossa v. Dept. of Professional Regulation, Division of Real Estate,* 474 So. 2d 322 (Fla. 3d DCA 1985); and Section 120.68(12), Florida Statutes (reviewing court shall not substitute its judgment for that of the agency on an issue of discretion). Without providing any support for her contention that the assessment of a penalty of the magnitude recommended against her requires full judicial review, Petitioner claims that she was entitled to such review under the Fourteenth Amendment. However she fails to point to any authority which would permit a reviewing court to substitute its judgment for that of the agency to whose delegated discretion the setting of a penalty has been placed by the legislature.

Petitioner had a right to judicial review of whether Respondent abused its discretion. However, what Petitioner really is complaining about is the scope of judicial review, which Petitioner notes is limited to a determination of whether the recommended penalty is within the limits provided by law. Such review does not extend to the wisdom or appropriateness of the penalty recommended. Petitioner also has not cited any authority that she would have been entitled to any greater scope of appellate review if she had been convicted of a crime.

Double Jeopardy

Penalties similar to those provided for violations of the state's Code of Ethics were recognized as valid by this Court in *U.S. v. Halper*, 490 U.S. 435 (1989).[3]

> Nothing in today's ruling precludes the government from seeking the full civil penalty against a defendant who previously has not been punished for the same conduct, even if the civil sanction imposed is punitive. In such a case, the Double Jeopardy Clause simply is not implicated. [*Id.*, 490 U.S. at 450]

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[3] On page 19 of her Petition for Writ, Petitioner states that this Court held that "a civil as well as criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment." However, Petitioner neglected to include the phrase "for double jeopardy purposes" after the word "punishment," which may explain her failure to distinguish *Halper* based on the fact that since Petitioner had not been subject to any prior criminal proceeding relative to her pressuring the Carrerous for the loan, the Double Jeopardy Clause did not attach so as to prohibit the imposition of a punitive sanction.

There, this Court held that the government cannot proceed civilly against a defendant who has already been prosecuted for the same offense if it seeks a punitive, rather than a remedial, sanction. *Id.*, 490 U.S. at 448. Because Petitioner had not been prosecuted for the same offense, there simply is no double-jeopardy issue here. Therefore, the reasoning in *Halper* does not apply.

Right to Counsel

Petitioner's claims under the Sixth Amendment likewise are invalid. Apart from the fact that Petitioner was represented by counsel at all stages of the proceedings below, so that she cannot demonstrate that she was affected in any respect by the Respondent's failure to appoint an attorney for her, this Court has held that the right to appointed counsel applies only to cases involving incarceration, *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and potentially to civil proceedings where the court determines that a high interest is at stake, *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981). Petitioner has demonstrated no such high interest here. Further, Petitioner was afforded the privilege granted by Section 120.57(1)(b)4, Florida Statutes, of retaining an attorney to represent her in the administrative proceedings before the Respondent, a privilege which she, in fact, exercised.

To the extent that Petitioner may be seeking to argue that her counsel in proceedings before Respondent was ineffective, she waived this argument by failing to raise it properly as a point on appeal before the state appellate court. The only mention of this issue on appeal consisted of one and a half lines in a footnote of her brief. Additionally, where, as here, there is no constitutional right to counsel

there can be no deprivation of effective assistance of counsel. *Wainwright v. Torna*, 455 U.S. 586 (1982).

Right to Jury Trial

Petitioner did not request a jury trial below, or even begin to assert that she had such a right until the filing of her initial brief on appeal. Regardless of whether she may have waived such an alleged right, however, the right to jury trial does not extend to administrative proceedings. The Sixth Amendment requires jury trials in all criminal prosecutions (the Seventh Amendment requires jury trials "in Suits at common law, where the value in controversy shall exceed twenty dollars"). Inasmuch as Respondent, as discussed above, does not impose "criminal" penalties, and inasmuch as proceedings before the Respondent, a statutorily created agency mandated by the Florida Constitution (see Article II, Section 8(f), Florida Constitution), are not suits at common law, Petitioner has not demonstrated that she had a right to a jury trial, even if she had requested one.

B. Notice of Charges (Due Process)

Petitioner argues here, as she did for the first time on appeal, that Respondent violated her right to due process because the complaint and Respondent's probable cause finding alleged that Petitioner had violated Section 112.313(6), Florida Statutes, by "coercing" the Carrerous into making a loan, while neither the hearing officer's recommended order nor Respondent's final order contained any finding that the Petitioner engaged in "coercion."

This is simply a matter of semantics, not a failure of notice reaching constitutional dimension. In the view of the trier of fact, the hearing officer, Petitioner exerted "pressure

on the Carrerous." [Petitioner's Appendix C, p. 21a.] Because the term "coerce" is not a special term of art, it is appropriate to look to the dictionary for its ordinary meaning. The American Heritage College Dictionary, 3d Edition, defines "coerce" as follows:

> 1. To force to act or think in a certain way by use of *pressure*, threat, or intimidation; compel.
> 2. To dominate, restrain, or control forcibly.
> 3. To bring about by force or threat.

[Emphasis supplied.]

Petitioner's use of pressure to obtain the loan from the Carrerous constituted "coercion," as that term is defined above. The pressure referred to was Petitioner's telling Mr. Carrerou, a landlord whose "rent roll" he reasonably assumed was controlled by the Petitioner, that "we" (presumably meaning the Housing Authority) would like him to make a loan to a man who was very important to the Housing Authority as a witness in a federal lawsuit.

Any variation between the wording used in the allegations made against Petitioner before the hearing and the factual and legal conclusions made by the hearing officer and the Respondent was immaterial. There is no significant difference between "coercing" the loan and the hearing officer's finding about Petitioner's "pressure" on the Carrerous. Petitioner--whose testimony that she simply referred Keaton to three possible lenders was completely rejected by the Hearing Officer--has not demonstrated any prejudice; she was on notice of the transaction charged, the persons involved, and the statute at issue. Consequently,

Petitioner's due process right to be informed of the charges against her were not violated.

CONCLUSION

Petitioner has not demonstrated her entitlement to review under either the facts or the law. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 95-683

In The
Supreme Court of the United States
October Term, 1995

JAN PARTIN,

Petitioner,

v.

STATE OF FLORIDA,
COMMISSION ON ETHICS,

Respondent.

Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida For The Second District

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REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER PETITIONER TIMELY RAISED THE FEDERAL QUESTIONS IN STATE COURT.

II. WHETHER PETITIONER HAS DEMONSTRATED THAT THE FLORIDA APPELLATE COURT'S DECISION INCORRECTLY RESOLVED THE FEDERAL QUESTIONS REGARDING HER RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

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REASONS TO GRANT THE WRIT

I. PETITIONER TIMELY RAISED THE FEDERAL QUESTIONS IN THE STATE COURT

a. Petitioner Was Not Required to Raise the Federal Questions until the Appeal to the Second District Court of Appeal.

Respondent argues that Defendant never raised her constitutional claims in the proceeding before the Commission and waited until the filing of her appellant brief to allege such defects. However the cases cited by Respondent do not pertain to constitutional objections. Indeed, the facial constitutionality of a statute may not be decided in an administrative proceeding in Florida. *Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund*, 427 So. 2d 153, 157 (Fla. 1982). In *Key Haven*, the Florida Supreme Court stated that the facial constitutionality of a statute cannot be addressed until the administrative process is concluded and the claim is before the District Court of Appeal on direct review of the agency action. 427 So. 2d at 157. In *Key Haven*, the Florida Supreme Court also stated that a claim that an agency has applied a facially constitutional statute in a way that the aggrieved party's constitutional rights have been violated is similarly to be determined by the District Courts of Appeal. The court stated as follows:

> The district courts provide a proper forum to resolve this type of constitutional challenge because those courts have the power to declare the agency action improper and to require any modifications in the administrative decision-making process necessary to render the final

agency order constitutional. 427 So. 2d at 158.

In *Rice v. Department of Health and Rehabilitative Services*, 386 So. 2d 844 (Fla. 1st DCA 1980) the court held that the District Court of Appeal had the power to decide constitutional questions on administrative appeals. With respect to questions not passed on or presented to a trial court the court noted that an appellate court ordinarily would not take up such questions. However the court stated as follows:

> That practice need not deter us from considering freshly raised questions of constitutional law, or any question of law which inheres in the case and may fairly be decided on the record, in appeals from agency action. For in reviewing agency action we are not reviewing the judgment of another court of law, and the deference due the agency is of another kind, less for its judgment on questions of law than for its greater familiarity with the statutory scheme and its expertise in the field regulated. Moreover, when an appeal is taken from agency action to a district court, that is the first court to receive the case and is the first tribunal to which a claim of statutory unconstitutionality can effectively be made. The district court's ultimate task under §120.68 is to review agency "action," not agency judgments, and the district court is empowered to review that "action" completely, though all dispositive legal issues were not or could not have been decided by the agency. 386 So. 2d at 849-850.

In the instant case, the Petitioner had no obligation to

raise the unconstitutionality of the statutory penalty in the administrative agency under Florida law. Therefore, Respondent's argument that her failure to raise those issues constituted an independent state ground for the decision of the Second District Court of Appeal is without merit.

It is significant to note that Respondent does not dispute that Petitioner adequately raised the federal issues in the Second District Court of Appeal.

b. This Court Has Granted Certiorari in Cases Where the Intermediate Appellate Court Does Not Render a Written Opinion.

Respondent argues that without a written opinion it cannot be concluded that the state court decided the federal questions asserted by the Petitioner. Respondent's argument is without merit. In *Palmore v. Sidoti*, 466 U.S. 429 (1984) the Florida trial court entered an order modifying the child custody portion of a final judgment of dissolution of marriage. In its order, the trial court did not specifically rule on Palmore's Fourteenth Amendment objection. The Second District Court of Appeal affirmed that order but did not render a written opinion. Nevertheless, this court granted certiorari to review the federal questions presented by decision of the appellate court affirming the trial court's order. This Court held that the decision violated the Fourteenth Amendment.

In *Ibanez v. Florida Board of Accountancy*, 114 S.Ct. 2084 (1994), the Florida Board of Accountancy entered an order disciplining the petitioner. The First District Court of Appeal affirmed that decision but did not render a written opinion. Nevertheless, this court granted certiorari to review the federal issues presented in that order affirming the agency

decision.

In the instant case, although the Second District Court of Appeal did not render a written order this is no bar to the granting of a petition of certiorari.

c. Any Objection in the Administrative Proceedings That the Penalty Statute Was Unconstitutional on its Face or as Applied Would Have Been Futile.

As Respondent has noted, the Florida courts have concluded that Commission on Ethics proceedings and Code of Ethics provisions are civil and not criminal. Indeed, in *D'Alemberte v. Anderson*, 349 So. 2d 164, 168 (Fla. 1977) the Florida Supreme Court held that Florida Statute §112.313 is not criminal and the penalties assessed thereunder are non-criminal. Accordingly, any objection to the administrative proceeding would have been futile. Furthermore, the fact that the Florida Supreme Court has already ruled that the penalties assessed under the act are "non-criminal" strengthens the conclusion that the Second District Court of Appeal was merely following the Florida Supreme Court's prior ruling on this issue which was argued by the Respondent in the Second District.

d. The Federal Question Presented by the Unconstitutionality of the Penalty Statute Was So Central as to Preclude Any Independent and Adequate State Ground.

In light of Petitioner's unrefuted arguments in the Petition that the penalty constituted a punishment, the order of the Commission on Ethics which was reviewed on appeal by the Second District Court of Appeal does not contain an

adequate and independent state ground to support the penalty. Respondent does not even argue that it does. Instead, Respondent relies solely on Petitioner's failure to raise the federal question during the administrative proceeding. Because Petitioner raised the federal question regarding the constitutionality of the penalty in the Second District Court of Appeal, the Second District Court of Appeal's decision affirming the order of the Commission on Ethics necessarily operated as a denial of the federal claim. This Court's jurisdiction over the case is thus established. Because there was no adequate state ground to support the imposition of the penalty in light of Petitioner's constitutional arguments, the decision of the Second District Court of Appeal affirming the penalty was necessary to a determination of the cause. Indeed, Respondent has completely failed to demonstrate that any substantive state ground accounted for the decision below. In *Durley v. Mayo*, 351 U.S. 277, 281 (1956) this court stated as follows:

> It is likewise settled that if the independent [state] ground was not a substantial or sufficient one, "it will be presumed that the state court based its judgment on the law raising the federal question, and this court will then take jurisdiction."

Contrary to Respondent's arguments, the jurisdiction of this court cannot be defeated simply because the intermediate state appellate court did not write an opinion.

II. PETITIONER HAS DEMONSTRATED THAT THE FLORIDA APPELLATE COURT'S DECISION INCORRECTLY RESOLVED THE FEDERAL QUESTIONS REGARDING HER RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

a. Procedural Safeguards of Criminal Prosecution.

It is significant to note that Respondent has not even addressed the test adopted by this Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) for the determination of whether an ostensibly civil sanction constitutes a criminal punishment. Obviously, the reason is that the application of the criteria to the statutory penalty in question results in the necessary conclusion that the penalty constituted a punishment.

Instead, Respondent relies on the fact that the Florida courts have already concluded that the Commission on Ethics proceedings and Code of Ethics provisions are civil and not criminal. However, this Court is the ultimate arbiter of the constitutionality of the penalty provision.

Citing *Commission on Ethics v. Sullivan*, 489 So. 2d 30 (Fla. 1986) Respondent also argues that under §112.324(7) Fla. Stat., the Respondent cannot "impose" any penalty; it can only "recommend." However, the characterization of the Commission on Ethics order as a "recommendation" of a penalty is a misnomer. Petitioner pointed out in the Petition that the Florida Supreme Court more recently stated that the statutory scheme was penal because it "imposes a penalty." *City of Miami Beach v. Galbut*, 626 So. 2d 192, 194 (Fla.

1993). The courts in Florida have referred to the act as "imposing severe penalties." *Barker v. State of Florida, Commission on Ethics*, 654 So. 2d 646, 649 (Fla. 3d DCA 1995)(See Petition, p. 15).

Indeed, in the Recommended Order the Hearing Officer stated that "Section 112.317, Fla. Stat."establishes the type of penalties which may be imposed for violations of the Code of Ethics . . ." (App. 21, paragraph 21). Furthermore, there can be no doubt that unless the District Court of Appeal sets aside or modifies the agency action which includes the penalty the decision of the Commission on Ethics is final as to the Petitioner. In any event, the Florida Supreme Court's earlier characterization of the Commission's action as a "recommendation" is not binding on this Court.

In *United States v. Ward*, 448 U.S. 242 (1980), the Coast Guard assessed a civil penalty against Ward. Ward filed an administrative appeal from that ruling contending that the act violated his privilege against compulsory self-incrimination. The administrative appeal was denied. Ward filed suit in U.S. District Court seeking to enjoin the Secretary of Transportation from enforcing the statute and from collecting the penalty of $500.00. 448 U.S. at 246-247. The fact that the penalty had not been collected in no way precluded this Court's consideration of Ward's constitutional arguments.

Section 112.317(2) Florida Statutes empowers the Attorney General to bring a civil action to recover the penalty determined by the Commission on Ethics.

Therefore, irrespective of the previous misnomer applied by the Florida Supreme Court that the Commission only "recommends" a penalty, there can be no doubt that all judicial

consideration and review of the penalty in the Florida courts has already taken place. Respondent cannot seriously contend that there is any further review of the penalty available in the Florida courts.

Respondent further argues that Petitioner was represented by counsel and did not assert a right to remain silent under the Fifth Amendment in the administrative proceeding. However, the state statute provided an administrative proceeding to Petitioner which the Supreme Court of Florida already characterized as giving to Petitioner all the due process to which she is entitled. *Debusk v. Smith*, 390 So. 2d 327, 328 (Fla. 1980). It was incumbent upon the State of Florida to provide a procedure commensurate with the imposition of a punishment which amounted to a second degree felony. Petitioner could not have anticipated that such a penalty would have been imposed. Consequently, Petitioner could not have known during the administrative proceedings that the penalty would constitute a criminal punishment until the conclusion of the proceeding when the penalty was assessed. She could not have known to assert her constitutional rights. It is sufficient that she timely appealed and argued the federal questions with respect to the penalty before the District Court of Appeal.

Respondent cites *U.S. v. Ward*, 448 U.S. 242 (1980) for the proposition that the penalty imposed in this case was not so punitive as to transform a civil remedy into a criminal penalty. However, Respondent has failed to point out that in *Ward*, the statute in question provided as follows:

> Any such civil penalty may be compromised by such Secretary. In determining the amount of the penalty, or the amount agreed upon in

> compromise, the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered by such Secretary. 448 U.S. at 245 n.5.

Further, the penalties assessed under the statute in *Ward* were to be paid into a fund used to finance the removal, containment or dispersal of oil and hazardous substances discharged into navigable waters and to defray the costs of administering the act. 448 U.S. at 246. However, in the case sub judice, the monies collected under the so-called "civil penalty" and "restitution penalty" are paid to the state general revenue fund rather than to the victim or a specific fund for the administration on the Commission on Ethics. §215.32(2)(a), Fla. Stat. Furthermore, the statute under consideration in the *Ward* case did not require proof of scienter as does the statute under consideration here. 448 U.S. at 249.

Finally, the statute under consideration in the *Ward* case had a criminal statute counterpart which included criminal penalties. This is not the case with §112.313(6) Florida Statutes. In fact, the predecessor to §112.317(1) made a violation of the §112.313 a criminal offense punishable as a first degree misdemeanor. However the Legislature repealed the criminal penalty leaving the so-called "civil penalties" intact. (See Petition, page 14). Therefore, there are critical and dispositive aspects of the penalty provision contained in §112.317 Fla. Stat. which are different than *Ward* or any other case.

CONCLUSION

Respondent has totally failed to rebut the points contained in the Petition for Writ of Certiorari. Section 112.317(1) Fla. Stat. authorizes the Commission on Ethics, a state agency, to impose, without any guidelines, a criminal punishment for what was formerly, under the statute, the crime of corruption. Although previously a first degree misdemeanor, the criminal punishment, equivalent to a second degree felony, masquerades as a "civil penalty." The punishment is not subject to review by any court so long as it is within the statutory guidelines. The $5,000.00 statutory maximum for the "civil penalty" in this case was exceeded by the assessment of an additional $1,200.00 so-called "restitution penalty" which is in fact an additional punishment.

As such, the penalty constitutes "punishment" for the reasons outlined in the Petition. This Petition for Certiorari should be granted.

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